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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/558,313	04/25/2000	Amit D. Agarwal	23984-13939 US	9641
758	7590	03/22/2011		
FENWICK & WEST LLP SILICON VALLEY CENTER 801 CALIFORNIA STREET MOUNTAIN VIEW, CA 94041			EXAMINER BUCHANAN, CHRISTOPHER R	
			ART UNIT 3627	PAPER NUMBER
			NOTIFICATION DATE 03/22/2011	DELIVERY MODE ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte AMIT D. AGARWAL

Appeal 2010-000555
Application 09/558,313
Technology Center 3600

Before HUBERT C. LORIN, JOSEPH A. FISCHETTI, and BIBHU R.
MOHANTY, *Administrative Patent Judges*.

MOHANTY, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

The Appellant seeks our review under 35 U.S.C. § 134 (2002) of the rejection of claims 1-37 and 39-47 which are all the claims pending in the application. These cited claims have all been rejected more than twice. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF THE DECISION

We AFFIRM.

THE INVENTION

The Appellant's claimed invention is directed to a system and method that automatically initiates the replenishment of items such as physical products. (Spec. 3:10-11). Claim 2, reproduced below with the numbering in brackets added, is representative of the subject matter of appeal.

2. A method in a data processing system for ordering an item, comprising:

[1] on a first date, fulfilling an order by a consumer for a first item;

[2] determining a target date for suggesting replenishment of the first item, the target date based upon the first date and the identity of the first item;

[3] on the target date, providing to the consumer an indication that the first item should be replenished, the indication including a user interface control usable by the consumer to request replenishment of the first item;

[4] receiving an indication that the control was used by the consumer to request replenishment of the first item; and

in response solely to receiving the indication, ordering a second item to replenish the first item.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

Hirst	US 5,655,174	Aug. 5, 1997
Ono	US 5,909,023	Jun. 1, 1999
Kenney	US 6,026,376	Feb. 15, 2000

The following rejections are before us for review²:

1. Claims 1-26, 36-37, 39-44³ are rejected under 35 U.S.C. § 103(a) as unpatentable over Kenney and Ono.
2. Claims 27-35 and 45-47 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kenney, Ono, and Hirst.

THE ISSUES

With regards to claim 1-26, 36-37, and 39-44 the issue turns on whether the cited prior art of Kenney and Ono discloses the argued claim

² We note that the Supplemental Examiner's Answer mailed Jul. 9, 2009 (hereinafter "Supp. Ans." does not contain the rejection made under 35 U.S.C. § 101 made in the previous Examiner's Answer of Dec. 9, 2008 and this rejection is therefore considered to be withdrawn by the Examiner.

³ We note that the Reply Brief filed Feb. 5, 2009 (hereinafter "Reply Br.", before the mailing of the Supp. Ans. of Jul. 9, 2009 lists claims 1-16 and 36-44 as being included in this cited rejection (Reply Br. 12). The listing of claims "1-16" instead of claims "1-26" is considered to be a typographical error there (note that the Supp. Ans. lists these claims as "1-26" (Supp. Ans. 5)). Claim 38 has been cancelled so it is not included in cited this rejection (Reply Br. 12).

limitations and if the combination of the references would have obvious.
The rejection of claims 27-35 and 45-47 turns on a similar issue.

FINDINGS OF FACT

We find the following enumerated findings of fact (FF) are supported at least by a preponderance of the evidence:⁴

FF1. Kenney has disclosed an interactive electronic shopping system (Title). The system includes a virtual shopping facility from a facility such as a grocery store and includes replicas of what you would see moving through the actual shopping facility (Abstract).

FF2. Kenney has disclosed that by clicking on the displayed product, or clicking on the product and dragging it to a video representation of a shopping cart that a shopper's selection can be made to the computer (Col. 12:55-63).

FF3. Kenney has disclosed that to make a reorder list that the shopper can select items from the current list, enter the current date and reorder frequency, and have it stored in the computer. The list 30 can be automatically maintained based on the actual ordering history (including ordering frequency) (Col. 11:13-34).

FF4. Ono has disclosed an online shopping support method (Title) in which the system searches the purchase history information of the user and calculates a purchase interval of each good purchased by the user (Abstract). The system judges whether the time corresponding to the purchase interval

⁴ See *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Patent Office).

has lapsed and transmits information of the good to the service use system (Abstract).

FF5. Ono discloses that the server judges that for each product for which the purchase interval was calculated and has lapsed that the information is transmitted to the client 220 to display in the output unit 223 (Col. 4:41-49).

FF6. Hirst has disclosed a system with an ambient sensor for estimating printing supply consumption (Title).

FF7. Hirst discloses that consumption is estimated by classifying each pixel that is estimated to be printed. A warning such as “low toner” is displayed on the printing device when estimates of printing surpass a limit. (Abstract).

ANALYSIS

The Appellant argues that the rejection of claim 2 is improper because Kenny and Ono fail to disclose claim limitations [1], [2], and [3] as cited above, and also because the combination of references would not have been obvious (Brief filed Aug. 1, 2006, 15-18). The Appellant presented similar arguments in the Reply Brief filed Feb. 5, 2009.

In contrast, the Examiner has determined that the cited claim limitations are found in Kenney and Ono and that the combination of references would have been obvious (Supp. Ans. 5-6 and 8-9).

We agree with the Examiner. In claim 2, claim limitations [1], [2], and [3] require:

[1] on a first date, fulfilling an order by a consumer for a first item;

[2] determining a target date for suggesting replenishment of the first item, the target date based upon the first date and the identity of the first item;

[3] on the target date, providing to the consumer an indication that the first item should be replenished, the indication including a user interface control usable by the consumer to request replenishment of the first item. (Claim 2).

Claim limitation [1] is shown by Kenney which discloses that by clicking on the product or clicking on the product and dragging it to a video representation of a shopping cart that a shopper's selection can be made to the computer (FF2). Claim limitation [2] is shown by Kenney disclosing that the customer can create a "reorder" list that is maintained by the computer and based on the actual ordering history including ordering frequency (FF3). Kenney has not specifically disclosed claim limitation [3], however, which is directed to on the target date, providing the consumer with an indication that the item should be replenished. Ono does however disclose claim limitation [3] showing that a server judges that for each product for which a purchase interval was calculated and has lapsed that the information is transmitted to the client to display in an output unit (FF5). Kenney's disclosure that the user can "click" on the product serves as a "user control" to assist in requesting replenishment.

The modification of the system of Kenney to include notifying the client when the products purchase interval has lapsed as taught by Ono is considered to be an obvious, predictable combination of familiar elements for the advantage of notifying the consumer as soon as the product needed to be reordered instead of waiting until they came into the virtual store again. For these above reasons, the rejection of claim 2, and claims 4-14 which have not been separately argued, is sustained.

Independent claims 15 and 36 contain argued claim limitations that are very similar to claim 2 addressed above. For the same reasons given

above, the rejection of these claims, as well as dependent claims 16, 18-26, and 37 which have not been separately argued is also sustained.

Independent claims 27, 31, and 35 also contain argued claim limitations that are very similar to claim 2 addressed above. Independent claims 27 and 31 contain argued claim limitations directed to “scheduling a time preceding the determined expiration time” for a “communication” that the “item should be replenished”. Hirst provides an additional teaching of notifying a user when a condition is met by showing notifying a user of printer that the toner is low (FF7). For the same reasons given above, the rejection of these independent claims 27, 31, and 35 is sustained. With regards to claims 27 and 31, the time at which Ono transmitted the client the information (FF4) would serve as a “scheduled time” and it would have been obvious to have this sent before expiration of the time the product needed to be replenished to avoid delivery lag time. Dependent claims 28-30, 32-34, and 45-47 have not been separately argued and the rejection of these claims is sustained for these same reasons.

Claim 1 is similar to claim 2, but contains an additional limitation for “a control useable by the consumer to request replenishment of the product by performing a single action”. Enabling the consumer to execute the request for replenishment in a “single action” is considered to be an obvious modification to increase speed and simplify the ordering process. In *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) the Court stated that when considering obviousness that “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR* at 418. Here, the modification

of the combination of Kenney and Ono to further include a request completed by a single action would have been readily inferred by one of ordinary skill in the art to simplify and speed up the process. Dependent claims 3, 17, and 44 contain a similar limitation and the rejection of these claims is sustained for these same reasons.

Claim 39 is similar to claim 2 but contains an additional limitation that “without intervention by the consumer, placing an order for replenishment of the item within a predetermined tolerance of the target replenishment date” which essentially is drawn to the system automatically ordering products for the consumer that are used frequently. Here, one of ordinary skill in the art would have readily inferred the advantage of automatically ordering and shipping items to consumers who place such recurring orders by establishing such a fulfillment contract with them in order to secure long-term business customers and such a modification of the proposed combination of Kenney and Ono references would have been obvious. The Appellant has not argued for claim 40 separately and this claim is rejected for these same reasons as well.

Claim 41 is similar to claim 2 but contains a limitation drawn to that “when testing indicates that the condition is satisfied, raising an event...and suggesting replenishment of the item to the purchasing entity”. Giving this claim limitation its broadest reasonable interpretation in light of the Specification it is broad enough to read on simply testing if the date “condition” for reorder has been met that the user should then be notified as suggested by the prior art Kenney and Ono (FF3-5). For these reasons the rejection of claim 41, and claims 42-43 not separately argued, is sustained.

DECISION

The Examiner's rejection of claims 1-37 and 39-47 is sustained.

AFFIRMED

MP

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